No. 82-1711

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF COLORADO,

Petitioner,

v.

FIDEL QUINTERO,

Respondent.

On Writ of Certiorari to

the Supreme Court of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID F. VELA
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ATTORNEYS FOR RESPONDENT
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QUESTIONS PRESENTED FOR REVIEW

1. Was the Petition for Writ of Certiorari untimely filed?

2. Whether the Colorado Supreme Court correctly ruled that the warrantless arrest of Respondent without probable cause rendered that arrest invalid and the items seized incident to that arrest inadmissible in evidence?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE FACTS

Respondent generally accepts the factual statement in the Petition for Writ of Certiorari, but reserves the right to make corrections or additions where appropriate.

SUMMARY OF THE ARGUMENT

1. The decision of the Colorado Supreme Court upon which this Petition for Writ of Certiorari is based was announced on January 31, 1983. Under applicable Colorado procedural rules no petition for rehearing was permitted, and the decision became final on that date. Thus the State's Petition for Writ of Certiorari, filed on April 20, 1983, was untimely and need not be considered by this Court. Rule 20.1, Supreme Court Rules.

2. There was no probable cause to arrest Respondent. At the time of his arrest, the arresting officer had no knowledge or reason to believe that Respondent had committed a crime or even that a crime had been committed. The officer was acting solely on a report of suspicious activity. Thus there was no constitutional basis for the arrest. Nor was there a "good faith mistake" which would operate to negate the exclusion of the items seized from Respondent incident to the arrest. Accordingly the Colorado Supreme Court properly affirmed the trial court's order suppressing those items.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY FILED AND SHOULD NOT BE CONSIDERED BY THIS COURT.

People v. Quintero, 647 P.2d 948 (Colo. 1983), was decided on January 31, 1983. Since the State had brought the appeal pursuant to Rule 4.1, Colorado Appellate Rules (1980 Repl. Vol. 1B), as an "interlocutory appeal," no petition for rehearing was permitted, and the remittitur was issued contemporaneously with the opinion. The time for filing a petition for certiorari with this Court thus began running on that date and expired sixty days later on April, 1, 1983. Rule 20.1, Supreme Court Rules. Since the State's Petition for Writ of Certiorari was not filed until April 20th, the Petition should be denied.[1]

The State has made some effort to show that it filed a Motion to Vacate Remittitur on or about February 16, 1983, which motion was denied on February 22nd. It is not clear what the purpose of this showing is. Rule 20.4 refers only to a petition for rehearing. The Motion to Vacate Remittitur thus must be considered superflous and cannot be considered as an extension of the period prescribed in Rule 20.1. Thus, the petition for writ of certiorari was untimely filed and should be denied. Cf. Allegrucci v. United States, 372 U.S. 954 (1963).

II. THE COLORADO SUPREME COURT PROPERLY UPHELD THE TRIAL COURT'S ORDER SUPPRESSING THE EVIDENCE SEIZED PURSUANT TO THE ILLEGAL ARREST OF THE RESPONDENT.

At the time he was dispatched to investigate Mrs. Bergan's call to the police, Officer Freeman, the arresting officer, knew only that there was

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[1]Rule 20.6 of the Supreme Court Rules provides for an application for an extension of time for filing the petition. However, the State apparently did not avail itself of this procedure to request such an extension. Nor has the State proferred any reasons for the untimely filing of the petition. See Schact v. United States, 398 U.S. 58 (1970).

a possible burglary suspect in the vicinity of Vine and Exposition. (Transcript at p. 41) Upon arriving at that location he observed a man, later identified as the Respondent, standing at a bus stop with a television at his feet. (Transcript at p. 42) Respondent gave his name, Fidel Quintero, but indicated that he had no identification. (Transcript at p. 43) When Mrs. Bergan made herself known as the person who had made the report to the police, but before she had told Officer Freeman the details of her observations,[2] Officer Freeman placed Respondent under arrest. (Transcript, at p. 45)

From the facts of this case it is clear that probable cause to arrest Respondent did not exist. Mrs. Bergan's observation of Respondent walking up to the porch of one of the houses in her neighborhood and later seeing him standing at a bus stop with a television set on the ground was, at best, a

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[2]In its Petition the State stated that "[i]t is undisputed that before the television and the video game were seized and before the defendant was taken into custody to police headquarters, Mrs. Bergan had made a full report to police concerning her observation of defendant's actions." (Petition at p. 12) This statement is erroneous. Officer Freeman testified as follows:

> Q Detective, do you recall whether the—do you recall when, at what point, the Defendant was placed under arrest?
>
> A Shortly right—when Sergeant King drove up and then the lady made herself known, then I placed him under arrest and put the handcuffs on him.
>
> • • • •
>
> Q Okay. Was that before or after you spoke with Mrs. Bergan?
>
> A That was at the time Mrs. Bergan made herself known, that she was the person that had called the police. Then, I placed him under arrest.
>
> Q What information did she provide you before you placed him under arrest?
>
> A She had provided me with no information at that point.

(Transcript at p. 46)

vague suspicion that Respondent was involved in criminal activity. Respondents' inability to provide identification added little to that suspicion. Brown v. Texas, 443 U.S. 47 (1979). See Kolander v. Lawson. ___ U.S. ___ (33 Crim. L. Rptr. 3063, May 4, 1983). Thus, as the Colorado Supreme Court ruled, none of the above circumstances, taken either by themselves or collectively, amounted to anything approaching probable cause to arrest the Respondent. Cf. Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560 (1971).

The court also correctly concluded that the evidence seized incidental to this invalid arrest was properly suppressed by the trial court. Section 16-3-308, Colorado Revised Statutes (1978 Repl. Vol. 8), which excepts from the exclusionary rule evidence seized as a result of a good-faith mistake is, by its own definition, inapplicable to the facts of this case. Section 16-3-308(a)(2) defines a "good faith mistake" as "a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause." Since, as the court noted, no facts were misperceived by Officer Freeman—rather the mistake invoked a judgmental determination that he had probable cause to make an arrest—the Colorado statute is inapplicable. In any event, the question of whether the Colorado Supreme Court correctly interpreted section 16-3-308 is not an appropriate one for this Court to determine. Wainwright v. Sykes, 433 U.S. 72 (1977).

Finally, the State contends that the Colorado Supreme Court's declining to adopt a good-faith mistake exception to the exclusionary rule as a matter of Fourth Amendment doctrine was erroneous. In so contending, the State is apparently relying upon the good-faith mistake/technical violation exception to the exclusionary rule initially formulated in United States v. Williams, 622 F.2d 830 (5th Cir. 1980). See also Stone v. Powell, 428 U.S. 465 (1976) (White, J., dissenting). That exception is inapplicable here.

As noted by the Colorado Supreme Court, this Court has not yet adopted such an exception as a matter of Fourth Amendment doctrine. See

Taylor v. Alabama, ___ U.S. ___, 102 S. Ct. 2664 (1982). This exception is especially inapplicable where, as here, the mistake was not factual but rather a judgmental error as to the existence of probable cause. Taylor v. Alabama, supra; See also Ybarra v. Illinois, 444 U.S. 85 (1979). The State does not contend that Officer Freeman misperceived any facts. Officer Freeman had no information that a crime had been committed and thus had no belief that Respondent had committed a crime.[3] Rather, as the Colorado Court found, Officer Freeman made a judgmental error of law. He felt he had probable cause to arrest the Respondent when, in fact, there was no factual basis to reasonably support such action. Thus, a good-faith mistake exception to the exclusionary rule should not be applied to the facts of this case.

CONCLUSION

The petition for writ of certiorari in this case should not be granted because, based on the facts of this case, the decision of the Colorado Supreme Court is substantially correct and does not present any significant

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[3] In its brief, the State states:

> The good faith of officer Freeman in seizing the television set and video game, and in arresting the defendant affirmatively appears in this case. He is a police officer with 21 years experience on the police department. He knew the procedures followed by professional burglars, who usually enter dwellings at a time when the occupants are not home.

(Petition at p. 10)

In fact, other than stating that he had had been with the Denver Police Department for 21 years, Officer Freeman gave no testimony as to his knowledge, or lack of it, regarding the nature and occurrence of burglaries based on his experience.

federal questions of law. Further, the State has failed to comply with this Court's rules regarding the timeliness for filing the petition.

Respectfully submitted,

DAVID F. VELA
Colorado State Public Defender

THOMAS M. VAN CLEAVE, III
Deputy State Public Defender

DORIAN E. WELCH
A Member of the Bar of this Court
Deputy State Public Defender

ATTORNEYS FOR RESPONDENT
1575 Sherman Street, #718
Denver, Colorado 80203
(303) 866-2865

CERTIFICATE OF MAILING

I, Dorian E. Welch, a member of the Bar of the Supreme Court of the United States and counsel of record for Fidel Quintero, respondent herein, certify that on May 12, 1983, I deposited in the United States Mails, postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, the foregoing Brief in Opposition to Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis.

DORIAN E. WELCH

CERTIFICATE OF SERVICE

I, Dorian E. Welch, a member of the Bar of the Supreme Court of the United States and counsel of record for Fidel Quintero, respondent herein, certify that on May 13, 1983, I served one copy of the attached Brief in Opposition to Petition for Writ of Certiorari on the Honorable Norman S. Early, Jr., District Attorney for the Second Judicial District, State of Colorado and Ms. Brooke Wunnicke, Chief Appellate District Attorney, counsel for Petitioner, by depositing same in the United States Mail, postage prepaid, addressed as follows:

The Honorable Norman S. Early, Jr.
District Attorney

Ms. Brooke Wunnicke
Chief Appellate District Attorney

West Side Court Building
924 West Colfax Avenue
Denver, Colorado 80204

Dorian E. Welch

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Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Fidel Quintero, respondent herein, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court, and to file herein his Brief in Opposition to the Petition for Writ of Certiorari previously filed by the State of Colorado. The Brief in Opposition to the Petition for Writ of Certiorari is presented herewith for filing.

The Affidavit of respondent in support of this motion is filed herewith.

Dated: May 13, 1983.

Respectfully submitted,

DAVID F. VELA
Colorado State Public Defender

THOMAS M. VAN CLEAVE, III
Deputy State Public Defender

DORIAN E. WELCH
A Member of the Bar of this Court
Deputy State Public Defender

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STATE OF COLORADO)
CITY AND COUNTY OF DENVER)

AFFIDAVIT

Fidel Quintero, being duly sworn and upon oath deposes and says:

1. He is the Respondent in the above-entitled action and makes this affidavit in support of his Motion for Leave to Proceed in Forma Pauperis herein.

2. That he is presently incarcerated in the Denver County Jail and, because of his proverty, is unable to pay the fees and costs of this proceeding or give security therefor.

3. That he has been indigent throughout the proceedings in the State of Colorado and has been represented by the Colorado State Public Defender at all stages of these proceedings.

FIDEL QUINTERO

FIDEL QUINTERO

Subscribed and sworn to before me this 13th day of May, 1983.

My commission expires August 22, 1984.

Notary Public

CERTIFICATE OF SERVICE

I, Dorian E. Welch, a member of the Bar of the Supreme Court of the United States and counsel of record for Fidel Quintero, respondent herein, certify that on May 13, 1983, I served one copy of the attached Motion to Proceed in Forma Pauperis, and Affidavit in support thereof on the Honorable Norman S. Early, Jr., District Attorney for the Second Judicial District, State of Colorado, and Ms. Brooke Wunnicke, Chief Appellate District Attorney, counsel for Petitioner, by depositing same in the United States Mail, postage prepaid, addressed as follows:

The Honorable Norman S. Early, Jr.
District Attorney

Ms. Brooke Wunnicke
Chief Appellate District Attorney

West Side Court Building
924 West Colfax Avenue
Denver, Colorado 80204

Dorian E. Welch